

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM LESTER MORGAN,

Defendant-Appellant.

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UNPUBLISHED

October 21, 2003

No. 242731

Saginaw Circuit Court

LC No. 02-021232-FH

Before: Donofrio, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of assault with intent to do great bodily harm less than the crime of murder, MCL 750.84, and filing a false report of a felony, MCL 750.411a(1)(b). He was sentenced as a third habitual offender to concurrent terms of eight to twenty years in prison on the assault conviction and to five years, four months to eight years in prison on the false report conviction. He now appeals and we affirm.

Defendant's convictions arise from an assault on his wife, Ronella Morgan. She testified that she and defendant had been visiting relatives and that a confrontation between defendant and a brother-in-law lead to an argument between defendant and the victim on their drive home. The victim went to the neighbor's for awhile to escape the argument, which resumed when she returned home. She then went to a bar owned by her cousin, staying about one-half hour. Upon her return home, defendant physically assaulted her. She was struck several times, resulting in broken bones in her face (specifically the area of her left eye and nose), her right eye was swollen shut, there was bruising to her arm and the loss of blood. At trial, the victim reported that the vision has not yet returned to normal, that she had to have a mental plate in her face, and that she stills has numbness between her eye and her nose.

Defendant drove the victim to the hospital. On the way, he told her to tell the story that she had been jumped, beaten and robbed. At the hospital, she heard defendant tell that story to the investigating officer. The officer confirmed that defendant gave him that version of events.

Defendant first argues that he was denied the effective assistance of counsel by trial counsel's failure to object to the calling of defendant's son, Marcus Morgan, as a witness without having been listed on the prosecutor's witness list. We disagree. The standard of review for a claim of ineffective assistance of counsel was set forth by the Supreme Court in *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001):

A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). “First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the ‘counsel’ guaranteed by the Sixth Amendment.” *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy. *Id.* at 690. “Second, the defendant must show that the deficient performance prejudiced the defense.” *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different. *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant’s attack on his wife woke up their then eleven-year-old son and ten-year-old daughter. Although the son was endorsed as a witness on the information, the prosecutor did not file a witness list in advance of trial indicating that Marcus would be called as a witness.<sup>1</sup> There was no objection, however, to Marcus testifying. Marcus’ testimony was essentially that he was awakened by the yelling and that he observed defendant striking the victim.

Not less than thirty days before trial, the prosecutor must provide the defendant with a list of witnesses the prosecutor intends to call at trial. MCL 767.40a(3). Thereafter, the prosecutor may amend the witness list only by leave of the court for good cause shown or by stipulation of the parties. MCL 767.40a(4). Thus, the prosecutor should have included Marcus on a list which indicated that the prosecutor intended to call him as a witness. But even if we were to assume that defense counsel would not have stipulated to adding Marcus to the list had the prosecutor requested, and the trial court would not have granted leave to the prosecutor to add Marcus over defense counsel’s objection, we are not persuaded that defendant has demonstrated a reasonable probability of being acquitted had Marcus not testified.

Clearly Marcus’ testimony benefited the prosecution. Marcus confirmed his mother’s testimony that defendant beat her, not some unknown robber. However, the prosecutor’s case was strong without Marcus having testified. The jury could certainly have been justified in convicting defendant based upon the victim’s testimony alone. Moreover, the defense was based upon the theory that the victim had been robbed, but that the victim chose to blame defendant

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<sup>1</sup> In fact, there were ten witnesses endorsed on the information. Six of those witnesses were marked with an asterisk, which indicated witnesses the prosecutor intended to call at trial. Marcus was one of the four witnesses listed on the information without an asterisk.

rather than the unknown robber because the victim was intoxicated. But for the jury to believe that theory, they would have to conclude that the victim was lying about how much she had had to drink and that the emergency room physician was incorrect in her assessment that the victim was not intoxicated. Further, the jury would have had to believe defendant's testimony that the investigating officer lied because he harbored ill will towards defendant because the police had been summoned in the past on a domestic violence call which the victim later recanted. Finally, defendant's theory was not consistent with the fact that the victim's blood was found inside the house, but not outside the house where the alleged robbery took place.

In sum, while it is conceivable that the jury may have reached a different result without having heard Marcus testify, it certainly does not rise to the level of a "reasonable probability" of a different result required to reverse the conviction based upon ineffective assistance of counsel.

Next, defendant argues that he was denied the effective assistance of counsel by counsel's failure to object to the prosecutor asking defendant on cross-examination whether the prosecution witnesses were lying. While such questions are improper, *People v Buckley*, 424 Mich 1, 17; 378 NW2d 432 (1985), we are not persuaded that defendant has demonstrated prejudice. We see no reasonable probability of defendant having been acquitted had defense counsel timely objected and the trial court having given a curative instruction.

We next turn to defendant's argument that the trial court erred in denying his request for an instruction on the lesser offense of aggravated assault, MCL 750.81a. Aggravated assault is clearly a cognate offense of assault with intent to do great bodily harm less than murder. A cognate offense is one which contains an element not found in the greater offense. *People v Cornell*, 466 Mich 335, 345; 646 NW2d 127 (2002). An element of aggravated assault is the infliction of a serious or aggravated injury. MCL 750.81a. Assault with intent to do great bodily harm, MCL 750.84, requires no infliction of an actual injury, aggravated or otherwise. Accordingly, aggravated assault (the lesser offense) contains an element (infliction of aggravated injury) not found in the greater offense (assault with intent to do great bodily harm). Therefore, aggravated assault is a cognate offense to assault with intent to do great bodily harm. Moreover, an instruction on a lesser-included offense is appropriate only if it is a necessarily lesser-included offense, not a cognate offense. *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002), citing *Cornell*, *supra*. Therefore, defendant was not entitled to an instruction on aggravated assault.

Defendant also challenges the scoring of the sentencing guidelines. Specifically, he argues that no points should have been assessed for Offense Variable 19. The trial court, in fact, assessed ten points for OV 19. OV 19 addresses the "Threat to the Security of a Penal Institution or Court or Interference with the Administration of Justice." Ten points are appropriate if the "offender otherwise interfered with or attempted to interfere with the administration of justice." Zero points should be assessed if the "offender did not threaten the security of a penal institution or court or interfere with or attempt to interfere with the administration of justice."

The application of the sentencing guidelines is reviewed de novo. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001); *People v Cook*, 254 Mich App 635; 658 NW2d 184 (2003). In *Cook*, an assessment of ten points for OV19 was held appropriate where the defendant fled from the police. On the other hand, in *People v Deline*, 254 Mich App 595; 658 NW2d 164 (2002), *lv gtd* 468 Mich 942 (2003), this Court held that ten points were not

appropriate where the defendant, convicted of drunk driving, had switched places with the passenger, denied being the driver, and refused a blood alcohol test. We believe that this case goes beyond merely lying to the police about being guilty, but affirmatively interfering with the administration of justice by inventing a crime where none existed, and falsely reporting that non-existent crime to the police. Accordingly, the sentencing guidelines were correctly scored.

We turn now to the issues raised by defendant in his pro per supplemental brief. Defendant first argues that he is unlawfully imprisoned because he is actually innocent of the charges. It was, of course, the jury's role to determine defendant's guilt. Defendant's argument consists largely of attacks on the credibility of the victim and others involved in this case. Defendant had the opportunity at trial to present evidence regarding the credibility of the victim and other witnesses. The jury concluded that defendant is guilty and there is no basis for this Court to substitute its judgment for that of the jury.

Next, defendant argues that there was a violation of the "spousal immunity privilege." With respect to both the spousal competency rule, MCL 600.2162(2) (a spouse may not testify against his or her husband in a criminal case except with the defendant's consent), and the spousal communication privilege, MCL 600.2162(7) (a spouse may not testify in a criminal prosecution regarding a confidential communication between the spouses unless the defendant waives the privilege), a spouse may testify where the defendant spouse is charged with a committing a crime against the testifying spouse, MCL 600.2162(3)(d). See also *People v Love*, 425 Mich 691; 391 NW2d 738 (1986). Accordingly, the victim could testify without defendant waiving the spousal privilege.

Defendant's next argument is that he was denied a fair trial by numerous alleged instances of prosecutorial misconduct. First, defendant raises a number of arguments that the prosecutor engaged in improper closing argument. We disagree. In each of the instances raised by defendant, the prosecutor's arguments were proper. Defendant also repeats issues raised above, such as calling an unendorsed witness and asking the defendant whether other witnesses were lying; there is no need to revisit those issues again. Defendant further argues that the prosecutor presented false evidence. Not only does defendant fail to establish that the evidence was, in fact, false, but he also fails to show that the prosecutor had knowledge of the alleged falsity. Defendant's remaining arguments regarding prosecutorial misconduct actually involve evidentiary issues which, even assuming that they are meritorious, could have been resolved with a timely objection.

Defendant also raises a claim that the trial court's performance denied him a fair trial. We are not persuaded that the trial court acted partially or otherwise abused its judicial discretion.

Affirmed.

/s/ Pat M. Donofrio  
/s/ David H. Sawyer  
/s/ Peter D. O'Connell